IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 65 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SURESH KANAGRAJ NADAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 65 of 1999

MR G RAMAKRISHNAN for Petitioner No. 1

MR KT DAVE, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE M.S.SHAH

Date of decision: 22/01/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This appeal is directed against the judgment and order dated 29.12.1998 passed by the learned Sessions Judge, Rajkot convicting the appellant-accused for the offence punishable under Section 302 IPC and sentencing the accused to undergo imprisonment for life with fine of Rs.500/= in default simple imprisonment for one month for the said offence. By the same judgment the accused was acquitted of the offence punishable under Section 135(1) read with Section 37 of the Bombay Police Act.

2. The accused was doing the business of preparing and selling South Indian dishes like idli, dosas on the Kalavad Road at Rajkot. The charge against the accused was that deceased Bhagirathsinh Juvansinh Jadeja used to often visit the larry of the accused and used to eat food articles free of cost and was harassing the accused. On 2.3.1997 at about 9.00 P.M., the deceased had gone to the larry of the accused and beaten the accused by giving slaps and fist and kick blows. Thereafter, the accused gave knife blows to the deceased and caused the death of the deceased. The accused was arrested in connection with the said offence registered at C.R. No. 111 of 1997 for the offences punishable under Section 302 IPC and under Section 135 of the Bombay Police Act at Rajkot Taluka Police Station. The said offence was registered on the basis of the information lodged by the accused himself at the aforesaid police station on the same day i.e. 2.3.1997 at about 10.50 P.M.

3. The prosecution case was that the accused used to run his business of preparing and selling South Indian dishes at Kalavad Road, Rajkot and deceased-Bhagirathsinh Juvansinh Jadeja used to visit the said place and used to demand and eat food articles from the said larry of the accused free of cost and the deceased was also harassing and abusing the accused to close the larry for about one week prior to the incident. The deceased had told Suresh Patel who was doing the business of motor cycle repairing in the adjoining larry in the same area, about the harassment by the deceased. Suresh Patel told the accused that deceased-Bhagirathsinh Juvansinh Jadeja of Nana Mava village was a head strong person and was harassing and bullying the people in the area and advised the accused not to spoil relations with him. Hence, the accused requested Suresh Patel to persuade the deceased not to harass the accused and not to spoil the business of the accused. As 2.3.1997 was a Sunday and the accused was likely to get more customers on Sunday evening, the accused and Suresh Patel had gone to the place where the deceased used to sit in the earlier part of the evening and the deceased had told them to go away and that he

would meet them after 8.00 O'clock. Accordingly, the accused and Suresh Patel had gone back to their larries. Suresh Patel had closed his business early as it was Sunday. The accused started preparing and selling South Indian dishes. At about 9.15 P.M. the deceased went on a scooter to the larry of the accused and the deceased called the accused and demanded the keys of the money box of the accused and pulled the accused on the road and started beating him by giving him kicks and fist blows. Therefore, the accused got frightened and in view of the threats which were being given by the deceased to kill the accused and also demanding the keys of the money box of the accused, the accused brought a knife from his larry and gave blows to the deceased and the deceased fell down near his scooter on the road. The accused was angry and again gave blows to the deceased and gave one blow on the neck of the deceased who succumbed to the injuries. Thereafter, the accused went to the police station and lodged the information with the police. Police Inspector-Vaghela recorded the information and treated the same as FIR, registered the offence against the accused and arrested the accused at the police station. The inquest panchnama was drawn at the General Hospital where the dead body of the deceased was taken by the relatives of the deceased who came to know about the incident. The panchnama of the place of offence was also drawn. The knife in question was also seized under the panchnama. The accused was charged with the offence of murder punishable under Section 302 IPC and under Section 135 of the Bombay Police Act. The accused pleaded not guilty.

4. At the trial, the prosecution relied on the evidence of Rajendrasinh Danubha Jadeja Exh. 28 and Ashokbhai Narsibhai Exh. 48. Rajendrasinh Danubha Jadeja is running a pan-beedi shop near the place of the offence. According to the said witness, there was scuffle and fighting between the deceased and the accused, the accused gave knife blows to the deceased, the deceased received injuries and was bleeding and lying on the road. PW 6 Suresh Naranbhai Vikani (Patel) was also examined at Ex.25. He was running a larry on the adjoining land, but had left the place before arrival of deceased. The other witnesses had gone to the scene of the offence subsequently and, therefore, their evidence is not required to be referred to. As far as the medical evidence is concerned, the prosecution examined Medical Officer-Dr Dhirajlal Valjibhai Chauhan Exh. 15 who had performed the post-mortem on the dead body of the deceased on 3.3.1997 and submitted the post-mortem note Exh. 17. According to the said witness, the deceased

had about 15 external injuries which consisted of 9 injuries of incised wounds on different parts of the body, one of them being on left side chin, second one on the lower part of the neck on left side, third one on 3" below the stab wound on the left side of the chest, fourth one was incised wound on front of right side of the chest, fifth one over abdominal wall on left side 4" above the iliac spine, seventh and eighth injuries on the left arm and right arm respectively and the ninth injury was a superficial abrasion on the left fore-arm. The deceased was also having four stab wound injuries, the first being on the upper part of front on chest of left side, the second on left side neck below the above incised wound injury, third on front of chest on left side and the fourth on chest on left side. There were also some superficial abrasions. Over and above the external injuries, the deceased was having internal injuries that pleura was cut at many places on left side and cavity of pleura was having 700 ML blood with clots and both the lungs were pale and left lung was having four cuts over upper and lower lobes and these cuts were corresponding to four stab wounds on chest. Both the lobes of left lung were collapsed. The heart was empty and covering of heart was pale and the brain, lever, suprarenals, spleen and kidneys were pale. According to the Medical Officer, as mentioned in the post-mortem note, the cause of death of the deceased was shock due to massive internal heammorhage with thoracic cavity on account of injury to the lung due to stab injuries over the chest. From the evidence on record, the learned Sessions Judge came to the conclusion that the accused had assaulted the deceased with knife and caused injuries to the deceased and due to the injuries received by the deceased, the death of the deceased occurred.

5. The defence raised at the trial the plea of private defence and also the plea of sudden and grave provocation. In support of the plea of self defence, the accused relied on the evidence of PW Rajendrasinh Danubha Jadeja Exh. 28 and PW Ashokbhai Narsibhai Exh. 48. Rajendrasinh Danubha Jadeja running a pan cabin in the area stated that the deceased was found coming to the larry of the accused, abusing him and asking him to close down the larry. The deceased had dragged the accused on the road, a scuffle ensued and then the accused gave knife blows to the deceased. In cross-examination, it was suggested to the said witness that the deceased was demanding hapta from the accused for keeping the larry there and the accused was refusing to give hapta. The defence also relied upon the evidence of Sureshkumar Naranbhai Vikani (Patel) PW 6 (Exh. 25) who was running

the business of motor cycle repairing in the adjoining larry and in his cross-examination by the prosecution, the said witness stated that on 2.3.1997, he had opened his cabin in the morning and at about 5.00 to 5.30 in the evening, the accused had gone to his cabin and told him that the deceased was abusing the accused and was taking away the dishes from his larry without paying any money and the accused had requested the said witness to prevail over the deceased and both of them had gone to meet the deceased, but the deceased had told them that he knew why they had come, but he would meet them at night and, therefore, they both had returned to the larries and the accused had opened his larry for the business. The learned Sessions Judge, however, took the view that from the evidence of the witnesses, it did not appear that the deceased acted in such a way that the accused could have apprehension of danger to his life or to his property. As regards the demand of the key of the money box, no key was seized during the investigation. The learned Judge also held that even if the deceased had demanded such keys and if the accused had reacted to that demand by assaulting the deceased with knife, the accused had exceeded the right of self defence, and more particularly looking to the number of injuries caused to the deceased as transpired from the post-mortem note, the accused had caused more injuries to the deceased than needed to remove the apprehension, if any, to his property.

6. The defence had also raised the plea of grave and sudden provocation. However, the learned Sessions Judge held that the deceased had gone to the place of offence without any weapon because there was no evidence on record to show that the deceased had gone with any weapon with him, the evidence of the eye witnesses did not show as to from where the accused had taken knife at the time of the incident. But the fact remains that the accused had gone to the police station with a blood stained knife, but the Investigating Officer had not collected any evidence regarding the ownership of the said knife used in the commission of the offence. But the accused was running the business of preparing and selling food articles like South Indian dishes and, therefore, he must be keeping a knife for cutting vegetables used in preparation of such dishes. Hence, it was more probable that the knife belonged to the accused and not to the deceased. Hence, only on the ground that the deceased did not carry any weapon with him, but the accused used his own knife, the learned Sessions Judge negatived the plea of sudden and grave provocation and held that the accused had acted in a cruel and unusual manner by taking

undue advantage of using his own knife. Hence, Exception 4 to Section 300 IPC was not applicable.

The learned Sessions Judge held that the accused had failed to prove any of the exceptions to Section 300 of the Indian Penal Code.

7. At the hearing of the appeal today, Mr G. Ramakrishnan, learned counsel for the appellant-accused has vehemently submitted that the learned Sessions Judge committed a grave error in rejecting the appellant's plea of self defence when it was the deceased who had assaulted the accused and had also dragged him and demanded the keys of the money box in the larry. Mr Ramakrishnan has further submitted that it has come out from the evidence of the witnesses that the deceased was a head strong person and was demanding hapta from the accused and it was because the accused was refusing to comply with the said illegal and unreasonable demand that the deceased was harassing the accused and had assaulted the accused when the incident in question took place. It is, therefore, submitted that the accused was entitled to invoke the plea of self defence available to the accused under Sections 96 to 100 IPC as an exception to criminal liability.

In the alternative, Mr Ramakrishnan has submitted that in any view of the matter even if it were to be held that the accused had exceeded his right of self defence, the case at hand clearly fell under Exceptions 1, 2 and 4 to Section 300 and, therefore, the appellant could not be said to have committed the offence punishable under Section 302 IPC, as at the highest the offence would be culpable homicide not amounting to murder. The learned counsel for the appellant-accused has taken us through the evidence and has also pointed out that even as per the prosecution case, the incident in question had taken place because the deceased was a head strong person and the accused had submitted an application dated 5.11.1997 (Exh.5) praying for production by the prosecution of the relevant criminal record of the deceased. Reliance is placed on the letter (Exh. 69 pg. 187 of the paper book) from the Police Inspector, Rajkot Taluka Police Station to the learned Public Prosecutor pointing out that deceased-Bhagirathsinh Juvansinh Jadeja was involved in various offences.

It is, therefore, submitted that the learned Sessions Judge ought to have believed the defence case that it was the deceased who assaulted the accused and, therefore, the accused had to resort to self defence and

that under such circumstances, the learned Sessions Judge was not required to weigh the injuries allegedly inflicted by the accused on the deceased in golden scales. In any case, the plea of sudden and grave provocation was made out from the prosecution case itself.

Mr Ramakrishnan, learned counsel for the appellant-accused has placed strong reliance on the decisions of the Apex Court in Murli alias Denny vs. State of Rajasthan, 1995 Supp (1) SCC 39 and Surinder Kumar vs. Union Territory, Chandigarh, AIR 1989 SC 1094.

8. On the other hand, Mr KT Dave, learned Addl. Public Prosecutor has supported the judgment under appeal and has submitted that in view of serious injuries inflicted by the accused on the deceased, the learned Sessions Judge rightly negatived the plea of self defence as well as the plea of sudden and grave provocation. It is further submitted that the accused is not entitled to get the benefit of Exception 2 about exceeding the right of self defence because the deceased was not carrying any weapon and the accused inflicted as many as 14 injuries on the deceased, hence it cannot be said that the accused did not have any intention of doing more harm than necessary for the purpose of such defence. The learned Addl.PP further submitted that the plea of grave and sudden provocation has also been rightly rejected by the learned Sessions Judge as the deceased was not carrying any weapon. The accused had acted in a cruel and unusual manner by inflicting so many injuries on the chest of the deceased and, therefore, the accused is not entitled to get the benefit of Exception 4 either.

9. Having heard the learned counsel for the parties, we are of the view that while we are not able to accept the submission of the learned counsel for the appellant-accused that the appellant-accused is entitled to be acquitted on the ground that the act of the deceased which occasioned the exercise of right of self defence was such an assault as may reasonably cause the apprehension that death or grievous hurt would otherwise have been the consequence of such an assault and, therefore, we are of the view that the accused was guilty of culpable homicide, we are certainly persuaded to accept the alternative plea urged on behalf of the accused that the deceased had given sudden and grave provocation to the accused and, therefore, the accused was deprived of power of self control and, therefore, the case falls under Exception 1 to Section 300 IPC which reads as under :-

"When culpable homicide is not murder-

Exception 1 : Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos :-

First - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly - That the provocation is not given by anything done in the lawful exercise of the right of pri..

Explanation : Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

10. The evidence on record particularly the letter (Exh. 69) from the Police Inspector, Rajkot Taluka Police Station clearly indicates that the deceased was involved in the following offences which were not merely punishable under the Bombay Prohibition Act but also under Sections 506(2), 451 and 452 of IPC:-

Sr.No.	Police Station	CR No.	Section
1.	Rajkot Taluka Police Station	45/88	506(2) IPC
2.	"	157/88	451 IPC
3.	C.Div. Police Station	71/92	66B Proh. Dt.1-3
4.	"	99/92	66B Proh. Dt.1-3

5.	Rajkot Taluka Police Station	8/93	66B, 65E, 81 Proh.
6.	"	477/93	147, 148 IPC 37(1), 135 B.P. Act
7.	"	252/93	66B Proh. Dt.1-3
8.	"	135/95	66B Proh. Dt.1-3
9.	"	561/96	506(2), 452 IPC
10.	"	254/94	324/114 IPC 37(1), 135 B.P. Act

The accused as well as the other persons carrying on business in the locality had found the deceased to be a head strong person who was harassing them and demanding haptas. The deceased was also taking away eatables from the larry of the accused without paying any money and inspite of entreaties made by the accused to the deceased in the early evening of 2.3.1997 i.e. the date of the incident, the deceased had gone to the larry of the accused at about 8.30 in the evening and assaulted the accused. In this set of circumstances, which emerge from the evidence of prosecution witnesses and which the learned Sessions Judge has not disbelieved, it is surprising as to how the learned Sessions Judge has rejected the plea of sudden and grave provocation only on the ground that the deceased had gone to the place of incident without any weapon whereas the accused had a weapon. In fact, in the same breath, the learned Sessions Judge has even accepted that it was very natural on the part of the accused to have a knife in his larry where the accused was preparing and selling South Indian dishes and, therefore, the knife was required for cutting vegetables for preparing dishes like dosas. Admittedly, it is not the prosecution case that Exception 1 to Section 300 relating to sudden and grave provocation was taken out in the facts of the present case by any of the provisos to Exception 1. Admittedly, the provocation was not sought or provoked by the accused as it was the deceased who had assaulted the accused. The deceased was admittedly not a public servant nor was he acting in obedience to any command of a public servant. Since it was the deceased who had initiated the fight, the deceased could not have invoked the right of private defence. Under this set of circumstances, we are clearly of the view that the learned Sessions Judge gravely erred

in turning down the plea of the accused under Exception 1 to Section 300 i.e. the plea that the deceased had caused grave and sudden provocation to the accused which resulted into the accused losing the power of self control and inflicting injuries on the deceased with knife which was lying in the larry of the accused carrying on the business of preparing and selling eatables.

11. In our view, the decision of the Apex Court in Murli alias Denny vs. State of Rajasthan, 1995 Supp (1) SCC 39 clearly supports the defence case. In that case the deceased was an anti-social man of violent nature and had gone to the shop of the accused and abused him. The accused had got enraged and inflicted stab injuries on the deceased with a knife and himself reported the matter to the police, Exception 1 to Section 300 IPC was held to be attracted under such circumstances.

The learned Addl.PP, however, submitted that in that case most of the injuries were found on the hips of the deceased and the Court found that there was a possibility of the deceased receiving those injuries during grappling.

12. In the said case before the Hon'ble Supreme Court, the prosecution evidence indicated that the deceased was a man of violent nature and had no regard to law and was creating terror and fear in the minds of common people. In such an aggressive mood, he must have gone to the shop of the accused as indicated in the FIR filed by the accused himself before the police. The deceased abused the accused and in the fight that ensued, the accused inflicted injuries on the deceased and reported the matter to the police.

The facts in the instant case are also quite similar as born out by the evidence of the other persons carrying on business in the locality in the vicinity of the larry of the accused that the deceased was a head strong person and was harassing the accused. It was the deceased who went to the larry of the accused, assaulted and dragged the accused on the road and also demanded key of the cash box. This was certainly a sudden and grave provocation.

As regards the submission of the learned Addl.PP that in the facts of the instant case, the injuries were found on the chest of the deceased, it is required to be noted that the deceased had assaulted the accused and dragged him on the road and thereupon the accused had

taken the knife from the larry and inflicted injuries on the deceased. It was in the course of such violent scuffle that the injuries were inflicted on the deceased and, therefore, it has to be held that the serious injuries on the chest were inflicted by the accused on account of grave and sudden provocation. The case clearly falls under Exception 1 to Section 300. In our view, therefore, the case at hand would not fall under Section 302 IPC.

In view of the above discussion, it is not necessary to consider the question whether the case would also fall under Exception 2 or 4 to Section 300.

13. The next question that arises for consideration is whether the case would fall under Section 304 Part I or Part II. Section 304 IPC reads as under :-

> "304. Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

Looking to the nature and number of injuries caused by the accused on the chest of the deceased, we are of the view that the case would fall under Section 304 Part I as the injuries were so serious that intention of causing death of the deceased must be inferred from the said injuries. It is only because the case falls under Exception 1 (grave and sudden provocation) that the case is not covered by Section 302 IPC.

14. In view of the above discussion, the conviction of the appellant-accused under Section 302 is set aside and we convict the appellant-accused for the offence punishable under Section 304 Part I.

15. On the question of punishment, we have heard the learned counsel for the parties. The learned Addl.PP has submitted that looking to the number of injuries, the

accused must be ordered to undergo imprisonment for ten years.

16. On the other hand, Mr Ramakrishnan, learned counsel for the appellant-accused has submitted that on the date of the incident the accused was a young boy of 22 years, the only earning member in the family with mother and younger brothers and was trying to earn his living by honest means but was being harassed by a head strong antisocial bully. At present the accused is about 27 years old and has a minor son.
It is further submitted by the learned counsel that the accused has already spent more than six years in jail, earlier as an under-trial prisoner and rest of the period as a convict. It is, therefore, submitted that the interests of justice would be met if the accused is merely sentenced to imprisonment for the period already undergone by him.

17. Having heard the learned counsel for the parties, and in the peculiar facts and circumstances of the case, which are highlighted hereinabove, we are of the view that the interests of justice would be served if the order of sentence passed by the learned Judge is modified and sentence for the period which the appellant-accused has already undergone is held to be sufficient for the offence of which he is found to be guilty i.e. under Section 304 Part I IPC and accordingly we modify the order of conviction and sentence passed by the learned Sessions Judge convicting the appellant-accused under Section 302 IPC and sentencing him to imprisonment for life to conviction under Section 304 IPC Part I and pass the order of sentence as already undergone.

18. The appeal is accordingly partly allowed to the aforesaid extent. The appellant-accused is accordingly directed to be released forthwith, if not required in connection with any other offence.

(B.J. Shethna, J.)

(M.S. Shah, J.)
sundar/-